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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 786

PITT RIVER POWER COMPANY (A CORPORATION),
Petitioner,

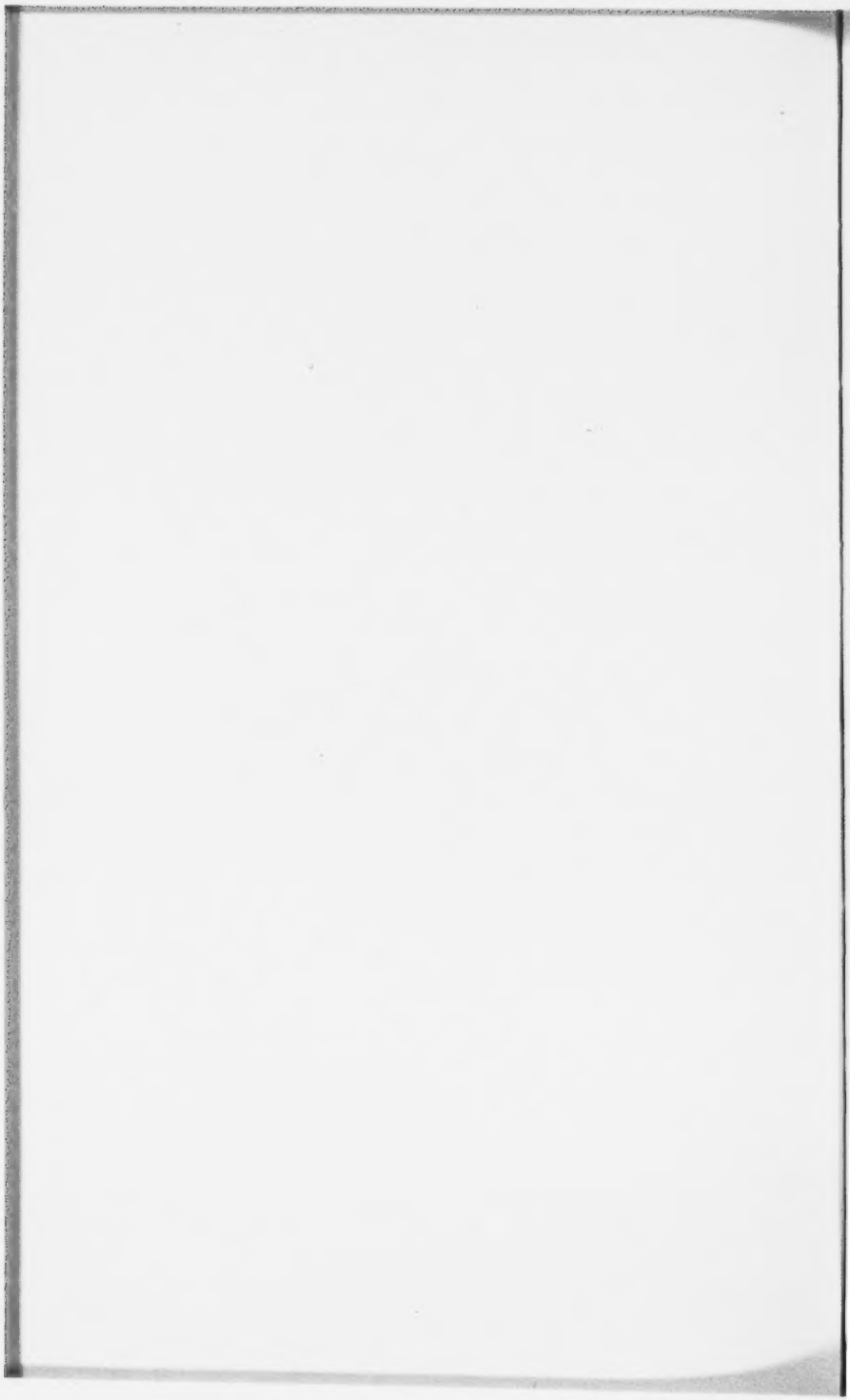
against

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT OF PETITION.

SANFORD H. E. FREUND,
Counsel for Petitioner.

CARL A. MEAD,
Of Counsel.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 786

PITT RIVER POWER COMPANY (A CORPORATION),
Petitioner,

against

THE UNITED STATES.

PETITION OF PLAINTIFF FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

Petition.

Petitioner, Pitt River Power Company, prays that a writ of certiorari issue to review the judgment of the Court of Claims of the United States entered in the above case December 7, 1942.

Matter Involved.

Action by the Pitt River Power Company against United States for the recovery of just compensation for its property taken by the United States for the Central Valley Reclamation Project in California.

The Reclamation Project was approved by the President pursuant to Act of Congress on December 2, 1935, by direct order and on August 26, 1937, an Act of Congress authorized the plan for the Central Valley Project (a damming of the Sacramento River) and empowered the Secretary of the Interior to proceed with its development. Construction work began on October 19, 1937, has proceeded continuously since that date, and is now about three-quarters completed.

The Petitioner is the owner of lands bordering on the Pitt River, a tributary of the Sacramento River, which will be flooded by the proposed dam. These lands were acquired by Petitioner for reservoir and hydroelectric development and there were two dam sites on the lands. The action was begun by the filing of a petition on November 29, 1941.

On April 18, 1942, the Attorney General demurred to the petition on the ground that it failed to state a cause of action, the claim being that there will be no taking of the property of the Petitioner until its lands are *actually* flooded. The demurrer was sustained and the petition was dismissed by the Court of Claims on December 7, 1942.

Statute Involved.

River and Harbor Act of August 26, 1937, Ch. 832 (50 Stat. 844, 850).

For relevant part, see Appendix, post, pp. 17-18.

Question Presented.

The question presented is whether the property of the claimant was taken by the approval of the plan, the definite location of the improvement and the Government's commitment to and authorization of the project by the Act of August 26, 1937, or otherwise prior to or upon the beginning of this action so as to give the Petitioner a right of

action, or whether, as held by the Court of Claims, there will be no taking of the Petitioner's property and, consequently, no right of action therefor, until it shall have been *actually* flooded by water set back by the Shasta Dam.

Specification of Error.

A Federal question was decided by the Court of Claims in a way probably in conflict with the applicable decisions of this Court and particularly with the decision in the subsequent case of *The United States of America, Petitioner,* v. *Victor N. Miller, and Others* (63 Sup. Ct. Rep. 276), decided at this Term of this Court on January 4, 1943, after the decision of the Court of Claims.

Reason for Granting the Writ.

In that case this Court held, in a case involving property condemned by the United States for the same Central Valley Project, that, in arriving at market value, any increment of value due to the approval of the plan and authorization of the project arising after the Act of August 26, 1937, must be disregarded. It follows that any decrease in the value of the Petitioner's property due to the approval of the plan and authorization of the project and definite commitment of the Government thereto, by the Act of August 26, 1937, arising after the adoption of that Act, must be disregarded in determining the just compensation to be given therefor.

The petition alleges that the property had substantial value for reservoir, dam site and water power purposes before the Act was passed. That value was destroyed by the passage of the Act, which involved the flooding of Petitioner's land and dam sites. A cause of action then arose in favor of the Petitioner against the Government to re-

cover the just compensation guaranteed by the Fifth Amendment.

Wherefore it is respectfully submitted that the petition should be granted.

Washington, D. C., March 4, 1943.

SANFORD H. E. FREUND,
Attorney for Petitioner,
55 Wall Street,
New York, N. Y.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 786

PITT RIVER POWER COMPANY (A CORPORATION),
Petitioner,

against

THE UNITED STATES.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The opinion of the Court of Claims is set forth in the Record (R. 66-69). It is not yet officially reported.

Jurisdiction.

Jurisdiction to issue the writ is conferred by the Act of February 13, 1925 (Ch. 229, Sec. 3 (c), 43 Stat. 939; 28 U. S. C. A., Sec. 288).

Question Presented.

The statement of the question presented, specification of error and statement of facts are set forth in the petition, *ante.*

The relevant part of the Statute involved is set out in the Appendix (*post*, pp. 17-18).

Argument.

This is not a condemnation proceeding. The Government has not instituted any such proceeding, although the River and Harbor Act of July 18, 1918, (Ch. 155, Sec. 5, 40 Stat. 904, 911) provides that, if condemnation proceedings are instituted, such "proceedings in condemnation shall be diligently prosecuted on the part of the United States in order that just compensation may be promptly ascertained and paid".

This is an action against the Government under the Fifth Amendment for the recovery of just compensation for property taken by the Government for public use.

Judicial Code, Sec. 145 (1); 28 U. S. C. A. Sec. 250;
Phelps v. *United States*, 274 U. S. 341, 344;
Jacobs v. *United States*, 290 U. S., 13, 16;
Shoshone Tribe v. *United States*, 299 U. S., 476, 497.

The petition alleges (R. 7) that lands of the Petitioner located along the Pitt River, a tributary of the Sacramento River, which are below the level of elevation 1065 feet on the United States Geological survey of the Kennett Reservoir, Shasta County, California, 1934, have been taken by The United States without the consent of the Petitioner. The lands so taken are indicated on the plan Exhibit A, annexed to the Petition.

The nature of the Petitioner's claim was stated by Mr. Justice Butler in the *Phelps* case as follows (274 U. S., 343-4):

> "Under the Fifth Amendment plaintiffs were entitled to just compensation; and, within the meaning of Sec. 145, the claim is one founded on the Constitution. Moreover, it has long been established that, where

> pursuant to an Act of Congress private property is taken for public use by officers or agents of the United States, the Government is under an implied obligation to make just compensation. * * * (p. 344) The Government's obligation is to put the owners in as good position pecuniarily as if the use of their property had not been taken. They are entitled to have the full equivalent of the value of such use *at the time of the taking paid contemporaneously with the taking.* As such payment has not been made, petitioner is entitled to the additional amount claimed."

Consequently it was held that the owner was entitled to interest on the value of the property from the time of taking until payment was made.

Such an action must be brought "within six years after the claim *first* accrues."

> Judicial Code, Sec. 156; R. S., Sec. 1069, 28 U. S. C. A., Sec. 262.

The Court of Claims held that no cause of action had yet accrued, saying (R. 68):

> "There has as yet been no taking of plaintiff's land or any interest therein. * * * No portion of such lands has as yet been flooded. * * * The project may be abandoned or, for any one of a number of reasons, may not be completed in accordance with the original plan. The essential elements of a taking are lacking."

The *Mississippi River Flood Control* cases (*United States* v. *Sponenbarger*, 308 U. S. 256; *Danforth* v. *United States*, 308 U. S. 271) on which the Court of Claims relied, are entirely unlike the present case. In those cases the Government was committed to no definite plan. The Chief of Army Engineers had devised a general plan for the 900 miles from Cape Girardeau to the Gulf, which expressly provided that it was subject to change by the Chief of Engineers, as the

situation developed. In the *Sponenbarger* case, brought by the land owner under the Tucker Act, it appeared that the proposed floodway had been abandoned (308 U. S. at p. 268). Also the Court held that the program of the Act had "greatly reduced the flood menace to respondent's land by improving her protection from floods" (308 U. S. 267). Judgment for the Government was affirmed.

The *Danforth* case was a condemnation proceeding under the Mississippi River Flood Control Act of May 15, 1928 (Ch. 569, 45 Stat. 534), in which this Court held that the value of the property was fixed by a previous agreement between the land owner and the Government. That agreement fixed the value at about double the value as found by the Commissioners in the condemnation proceeding.

Nevertheless, the property owner contended in this Court that she was entitled to interest on the increased award from the date of enactment of the Mississippi River Flood Control Act (May 15, 1928) or from the date when the work of construction on the new levee was begun (October 21, 1929) or from the date when it was practically completed (October 31, 1932). These claims were rejected by this Court, which held (308 U. S. 284):

> "* * * we are of the view that the taking in a condemnation suit under this statute takes place upon the payment of the money award by the condemnor. No interest is due upon the award * * * (p. 286). The riverbank levee at the fuse-plug has not been lowered from its previous height. Consequently the land is as well protected from destructive floods as formerly. We cannot conclude that the retention of water from unusual floods for a somewhat longer period or its increase in depth or destructiveness by reason of the set-back levee, has the effect of taking."

The situation in that case is, of course, entirely different from that in the present case, where lands are intended to

be permanently flooded by a dam. Such an intention undoubtedly contemplates a taking.

1 Lewis on Eminent Domain (3d Ed.) Sec. 80;
United States v. *Lynah,* 188 U. S. 445, 469;
Goodman v. *United States,* 28 Fed. Supp. 497, 503.

Lewis says:

> "Where works are constructed below the lands of a proprietor, such as a bridge, or culvert, or dam, or alteration of the channel, which cause the water to set back and overflow the land of such proprietor, there is a violation of such right and, if the works are authorized by law, there is a taking for which compensation must be made".

In *Shoemaker* v. *United States* (147 U. S. 282), relied upon in the Danforth case (308 U. S. 286), the Act there in question provided (147 U. S. 285):

> "* * * if in any case the owner or owners of any portion of said land shall refuse or neglect, after the appraisement of the cash value of said lands and improvements, to demand or receive the same from said court, upon depositing the appraised value in said court to the credit of such owner or owners, respectively, the fee-simple shall in like manner be vested in the United States".

The plaintiff refused to accept the award and it was paid into court (147 U. S. 321). It was held (p. 304) that the Court's charge to the Commissioners that they could not "consider the value given them (the lands taken) by the establishing the park" was correct. That ruling is in accord with our contention that the value of the petitioner's property must be determined without consideration of the effect on such value of the adoption by Congress, on August 26, 1937, of the Plan for the Central Valley Project.

This Court also held in the Shoemaker case that the value of the lands taken must be fixed as of the date of the vesting of title, which, by the Act there in question, as above stated, was fixed as the date of payment of the award into Court.

There is no such provision in the Statutes relating to the Central Valley Project.

The situation in case of a dam is entirely different from that in the Mississippi River Flood Control cases. The construction of a dam inevitably results in flooding lands above it. That is its purpose. The River and Harbor Act of March 3, 1899 (Ch. 425, Sec. 9, 30 Stat. 1151, 33 U. S. C. A., Sec. 401) provides that when the plans for a dam have been approved by the Chief Engineer and by the Secretary of War

> "* * * it shall not be lawful to deviate from such plans either before or after completion of the structure, unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of War."

There is no suggestion that the plan for the Central Valley Project has been changed or abandoned or that Petitioner's lands will not be flooded; and, with the work three-quarters completed, the Court can hardly presume that there is any likelihood of abandonment.

Since the decision of the Court of Claims in this case, a similar question has been considered by this Court.

> *United States* v. *Miller*, 63 S. Ct. Rep., 276; decided January 4, 1943.

That was a condemnation proceeding arising out of the same Central Valley Project which is involved in the present case. Property was there taken for the relocation of the line of the Central Pacific Railroad. The Act of Con-

gress of August 26, 1937 (Ch. 832, Sec. 2, 50 Stat., 844, 850) authorized the Central Valley Project "in accordance with the plans set forth in Rivers and Harbors Committee Document Numbered 35, Seventy-third Congress".

In that case the title was vested, pursuant to Act of Congress, as of December 14, 1938. It appeared, however, that the value of the property taken had increased, due to the adoption of the plan, between August 26, 1937, when Congress authorized the plan, and the date when title was vested. The Government contended that the claimant was not entitled to recover from the Government this increment of value, on the ground that "the United States was definitely committed to the project August 26, 1937".

The trial court ruled in accordance with the Government's contention; but the judgment was reversed by the Circuit Court of Appeals, on the ground that this ruling was incorrect.

In this Court the judgment of the Circuit Court of Appeals was reversed and the judgment of the District Court affirmed.

This Court held (63 S. Ct. 280):

> "Respondents correctly say that value is to be ascertained as of the date of the taking."

Also it was held that, as the lands in question were probably within the scope of the project from the time the Government was committed to it on August 26, 1937, any increase in value due to the Government project between that date and the vesting of title on December 14, 1938, could not be recovered.

In other words, the just compensation guaranteed by the Constitution could not be increased by any increment of value which was due to the adoption of the Government's plan, accruing after the Government was definitely committed to the project.

If a property owner is not entitled to any increment of value due to the Government project accruing after the Government is finally committed to the plan, it must equally follow that the owner of property taken is entitled to recover the value of his property as it was before the Government became committed to the project, without deduction for any subsequent decrease in the value of his property due to the Government's commitment to the plan in question.

Orgel on Valuation under Eminent Domain, Secs. 103, 104, p. 351;

1 Nichols on Eminent Domain (2d Ed.), Sec. 221, p. 676.

Orgel says:

> "It would be grossly unfair to permit a condemnor to take advantage of a depreciation in values caused by anticipated injuries from the proposed improvement and general recognition of this fact is perhaps reflected in the lack of definitive holdings on this point."

Nichols says:

> "To allow a public agency to depress market values in a particular neighborhood by threatening to erect an offensive structure in its midst, and then to take advantage of this depression in paying for the land required for the structure would be so abhorrent to the public sense of justice that it has never been seriously argued that it could be done."

In the present case the petition alleges that the Petitioner's property had a substantial value for reservoirs for water supply purposes and for the development of a hydro-electric project (R. 6-8).

The value of the Petitioner's property for these purposes was destroyed by the adoption of the Government's plan on August 26, 1937, as, under that plan, all of Peti-

tioner's land which was below the 1065 foot elevation would be flooded.

After the passage of the Act of August 26, 1937, the Petitioner could not proceed to develop its hydro-electric project. Its dam sites were unavailable. Its reservoir for irrigation and power purposes was appropriated by the Government. Its property must lie idle from that date.

Even now, after work on the Shasta dam has proceeded for over five years, the work is only three-quarters completed. The Petitioner could not recover the value of any such improvements installed there during the period of many years which must elapse before the huge Shasta dam can be completed and the further years before the Shasta reservoir is filled with water and Petitioner's lands are actually flooded.

Lewis says (2 Lewis on Eminent Domain (3d Ed.), Sec. 742, p. 1321):

> "As we have before observed, the estimating and payment of the compensation should be concurrent with the taking. As this is impossible in practice, a time must be selected with reference to which the compensation shall be assessed and to which the title will relate when the compensation is paid. This point of time must necessarily be before the compensation can be paid. Between that time and the payment the owner has only a qualified use of his property. He may use it as it is, but he cannot improve or sell it except subject to rights acquired by the condemnation."

In other words, Petitioner was deprived, after August 26, 1937, of all profitable use of its property for the purposes for which it was acquired and was adapted.

Consequently, so far as the Central Valley Project had any effect on the value of the Petitioner's property, the property must be valued as of August 26, 1937, when the Government became finally committed to the project.

It further inevitably follows that the property was then taken and that a cause of action then arose in favor of the Petitioner and against the Government.

Matter of widening Wall-street, 17 Barb. 617, 625.

In that case Roosevelt, J., said:

> "To deny to an owner the free enjoyment of his property in the only mode in which it could be enjoyed, as in this case by building on it, and to do so from considerations of possible or probable public advantage, expected to be realized, and that too for a period of indefinite duration, is to that extent as much and as truly a taking of private property for the public use, as if the entire fee simple were assumed."

This Court has constantly become more liberal to property owners in actions brought to recover just compensation under the Fifth Amendment. In the early cases only the value of the property was allowed, although it was not paid until years after the property was taken.

United States v. *Great Falls Mfg. Co.,* 112 U. S. 645;
United States v. *North American Co.,* 253 U. S. 330.

Now, as already stated (*ante,* pp. 6-7), allowance is made for the owner's loss due to his inability to make profitable use of his property. It follows inevitably that, when the owner is deprived of the profitable use of his property, there is a taking of his property, and a right of action to recover therefor under the Fifth Amendment forthwith arises.

Condemnation cases, such as *Shoemaker* v. *United States* (147 U. S. 282), where the statute authorizing the condemnation proceeding fixes the date of the vesting of title, have no bearing on the question whether this petition shows the existence of a right of action under the Fifth Amendment as of August 26, 1937, when the Government became definitely committed to the project.

There must be some point of time when it can be said that the Petitioner's dam sites were definitely taken and this must be a point of time which is identifiable. Obviously the identifiable event is not when preliminary discussions first arose over the creation of the Central Valley Project and it is equally obvious that it is not the indefinite point of time in the future when the water rises behind the Shasta dam to the full elevation level of 1065 feet in the U. S. Geological Survey. The basis of the Petitioner's claim is for the destruction of its water power rights through the inevitable flooding of its land and therefore decrease in the head of water available at its dam sites. Between the passage of the Act of Congress authorizing the plan for the Central Valley Project and empowering the Secretary of the Interior to proceed with its development until the last foot of the 1065-foot level is reached, there is no event with which a taking of the Petitioner's dam sites can be identified. Certainly it cannot be said that a separate cause of action arises with each increase of a fraction of an inch in the level of water behind the Shasta Dam and that the Statute of Limitations as to that particular fraction of an inch begins to run as the water rises to that point. It takes years to fill a reservoir of the great capacity of that contemplated in the Sacramento River and during the period of filling the water level may in some years recede. On such temporary recessions should the Petitioner return compensation received and as the level rises again sue for a "taking"? Certainly also Petitioners have lost their property before the last inch of the 1065 foot level is reached.

Under the doctrine of *U. S.* v. *Miller*, supra, if the Petitioner, after Congress authorized the Central Valley Project, erected any dam structures on its property to utilize its water power facilities pending a complete flooding to the 1065-foot level, no recovery could be had against the

United States for the value of these facilities. The use of its property for the purpose for which it was acquired ended then on the date of the Act of Congress. The Petitioner has therefore had taken from it through the Act of Congress approving the Central Valley Project its dam sites and it is this Act of Congress that is the single identifiable event which fixes the taking of Petitioner's property by the United States.

This question is a very important one. If this application is denied and this Court should later hold that a right of action arose when the Act of August 26, 1937, was passed, the claim of this property owner would be barred after August 26, 1943. The question is important not only for this claimant but for many others similarly situated. The Court will take judicial notice that the Government has recently taken much property for war purposes, and similar questions may arise in many of these instances.

The question should be finally settled by this Court promptly, that owners whose property is taken by the Government may know their rights. Can they improve and enjoy their property or must they wait for years without any profitable use of their property until the project is completed and the property is flooded, and then be faced with the possibility of a decision by this Court that their cause of action arose when the Government became definitely committed to the project and that the claim is barred by the Statute of Limitations?

The plaintiff's petition for a writ of certiorari should be granted.

Washington, March 4, 1943.

SANFORD H. E. FREUND,
Attorney for Petitioner,
55 Wall Street,
New York City.

CARL A. MEAD,
Of Counsel.

APPENDIX.

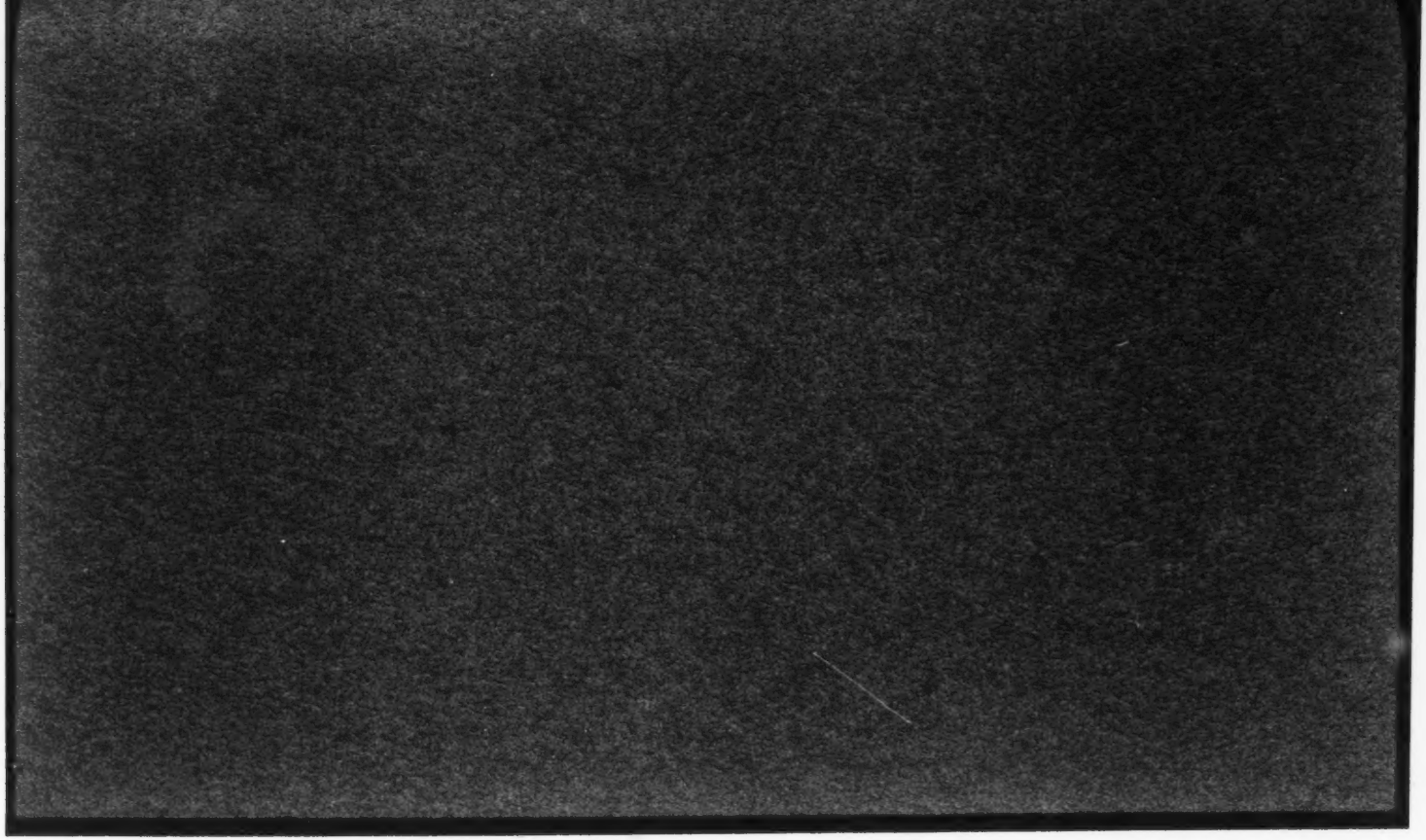
Relevant Part of Statute Involved.

Section 2 of River and Harbor Act of August 26, 1937, Ch. 832 (50 Stat. 844, 850):

"Sec. 2. That the $12,000,000 recommended for expenditure for a part of the Central Valley Project, California, in accordance with the plans set forth in Rivers and Harbors Committee Document Numbered 35, Seventy-third Congress, and adopted and authorized by the provisions of section 1 of the Act of August 30, 1935 (49 Stat. 1028, at 1038), entitled 'An Act authorizing the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes', shall, when appropriated, be available for expenditure in accordance with the said plans by the Secretary of the Interior instead of the Secretary of War; *Provided*, That the transfer of authority from the Secretary of War to the Secretary of the Interior shall not render the expenditure of this fund reimbursable under the reclamation law; *Provided further*, That the entire Central Valley project, California, heretofore authorized and established under the provisions of the Emergency Relief Appropriation Act of 1935 (49 Stat. 115) and the First Deficiency Appropriation Act, fiscal year 1936 (49 Stat. 1622), is hereby reauthorized and declared to be for the purposes of improving navigation, regulating the flow of the San Joaquin River and the Sacramento River, controlling floods, providing for storage and for the delivery of the stored waters thereof, for the reclamation of arid and semiarid lands and lands of Indian reservations, and other beneficial uses, and for the generation and sale of electric energy as a means of financially aiding and assisting such undertakings and in order to permit the full utilization of the works constructed to accomplish the aforesaid purposes: *Provided further*, That, except as herein otherwise specifically provided, the provisions of the reclamation law, as amended, shall govern the repayment of expenditures and the construction, operation, and maintenance of the dams, canals, power plants, pumping plants, transmis-

sion lines, and incidental works deemed necessary to said entire project, and the Secretary of the Interior may enter into repayment contracts, and other necessary contracts, with State agencies, authorities, associations, persons, and corporations, either public or private, including all agencies with which contracts are authorized under the reclamation law, and may acquire by proceedings in eminent domain, or otherwise, all lands, rights-of-way, water rights, and other property necessary for said purposes: *And provided further,* That the said dam and reservoirs shall be used, first, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses; and, third, for power."

[redacted]



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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 786

PITT RIVER POWER COMPANY (A CORPORATION),
PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 67–69) is not yet officially reported.

JURISDICTION

The judgment of the Court of Claims was entered December 7, 1942 (R. 69). The petition for writ of certiorari was filed March 4, 1943. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED

Whether the legislative approval and authorization of the Central Valley project in California and the partial construction of a dam which is intended, when completed, to impound water which will overflow petitioner's land, constitute a present taking of petitioner's property by the United States for which compensation is recoverable.

STATUTE INVOLVED

The appropriate portion of the statute involved is set forth in the Appendix, *infra,* pp. 11–12.

STATEMENT

Petitioner, a California corporation, brought this suit in the Court of Claims to recover compensation for an alleged taking of its property. The allegations of its complaint may be summarized as follows:

On December 2, 1935, the President of the United States, pursuant to Section 4 of the Act of June 25, 1910, 36 Stat. 835, approved the recommendation of the Secretary of the Interior that the Central Valley development in California be constructed as a Federal reclamation project (R. 6, 60–66). That project embodied a plan for the conservation, regulation, distribution, and utilization of the water resources of the Sacramento and San Joaquin Rivers (R. 60). It contemplated the restoration of commercial navigation on the upper Sacramento River, increased

flood protection for the valley land, and incidentally the generation of hydroelectric energy (R. 61). The key unit of the project was to be the Kennett Reservoir on the Sacramento River which would store 3,000,000 acre-feet of water to be impounded by a dam 420 feet high (R. 61).

By the Act of August 26, 1937, Congress recognized and approved the Central Valley project as a reclamation project and empowered the Secretary of the Interior to proceed with its development, transferring jurisdiction over the expenditure of an appropriation of $12,000,000 for the project from the Secretary of War to the Secretary of the Interior (R. 6–7). On October 19, 1937, under the direction of the Secretary of the Interior, construction work was commenced on the Kennett-Shasta Dam and has proceeded continuously since that date (R. 7).

Petitioner is the owner of or otherwise interested in tracts of land in Shasta County, California, which are located on or near the Pitt River,[1] a tributary of the Sacramento River. Because of the conformation of the land and the large and constant flow of the Pitt River, whose water may be impounded by dams which can be

[1] The correct spelling of this name is Pit River. Webster's *New International Dictionary* (2d ed.), p. 3109, title Pit River; 22 *The Americana*, p. 119, title Pit-River Indians; 18 *New International Encyclopaedia*, p. 676, title Pit River Indians. Cf. R. 3, 10A. However, petitioner's name as used in the pleadings adopts the form "Pitt," so we, as did the court below, adopt that usage throughout.

erected on excellent dam sites on these lands, the property in question is peculiarly adapted for large reservoirs for water supply purposes and, in combination with certain other lands, is suited to the development of a hydroelectric project. (R. 6.)

The complaint further alleged that the construction and operation of the Kennett or Shasta Dam and Reservoir were intended to and will flood the lands along the Sacramento River and its tributaries many miles above the location of the dam, including a great part of petitioner's lands located along the Pitt River (R. 7); that the part of petitioner's lands which will be thus flooded has been taken by the United States without petitioner's consent; that other lands of petitioner which will not be flooded by the project have been damaged by the proposed erection of the dam and reservoir; and that the riparian rights of petitioner in the Pitt River have been taken by the United States (R. 7). Petitioner stated that the United States has failed to condemn its property and has not compensated petitioner therefor (R. 8), and asked judgment in the sum of $6,000,000, with interest from the date of the alleged taking (R. 9).

The United States demurred to the petition (R. 66). The Court of Claims sustained the demurrer, holding that there had as yet been no taking of petitioner's property, that there might never be a taking of its property, and that the action was premature (R. 67–69).

ARGUMENT

Petitioner admits that the construction of the proposed dam and reservoir has not been completed, and it does not allege that its lands have been flooded or otherwise physically occupied or damaged (Pet. 2, 13). It merely contends, as it did below, that there has been a taking of its property by the United States as a result of the enactment of the Act of August 26, 1937 (*infra*, pp. 11–12), which authorized the Central Valley project and contemplated the construction of a dam and reservoir that will ultimately overflow petitioner's land (Pet. 2, 13). Petitioner further argues that as a result of the passage of the 1937 Act, its property has been compelled to lie idle and it has been prevented from proceeding to develop its hydroelectric project; and that such circumstances constitute an appropriation of its property (Pet. 13). We submit that the court below properly held that these contentions are without merit.

1. Neither the adoption of the Central Valley plan, the legislative approval of the project, nor the commencement of construction, constituted a taking of petitioner's property by the United States. The situation here involved falls within the category of such decisions as *United States* v. *Sponenbarger*, 308 U. S. 256, where the adoption of a project contemplating the use of plaintiff's land for a spillway and the enactment of legislation authorizing the project were held not to

amount to a taking, and *Danforth* v. *United States,* 308 U. S. 271, where even the construction of some of the physical facilities necessary to put the project into operation was thought not to be an appropriation prior to actual use of the land as envisioned by the project. The claim of taking in the instant case is no less premature than that involved in the *Danforth* case, for in both cases the physical facilities contemplated by the project were not complete at the time of the alleged taking. There is at best a present apprehension of a future taking, which it is clear does not warrant the recovery of compensation. *Peabody* v. *United States,* 231 U. S. 530; *Portsmouth Co.* v. *United States,* 250 U. S. 1; same, 260 U. S. 327. As the Court below appropriately observed (R. 68):

> The beginning of construction does not necessarily mean that it will be completed. The lands in question are located on a tributary stream. No portion of such lands has as yet been flooded. It is not certain that any part of them will be. It is anticipated that some of the lands will be flooded when and if the Shasta Dam is completed. However, the plans may be modified by the Chief Engineer with the approval of the head of the department. The height of the dam may be changed. The available funds may be withdrawn by act of Congress, or any supplemental funds needed to finish the project may be denied.

The project may be abandoned or, for any one of a number of reasons, may not be completed in accordance with the original plan. Essential elements of a taking are lacking.

The sole reason advanced in the petition for granting the writ (Pet. 3) appears to be the decision of this Court in *United States* v. *Miller,* 317 U. S. 369. That case, which also involved the Central Valley project, held that in determining compensation payable in condemnation proceedings a jury may not take into consideration increase in value resulting from the circumstances that the lands taken were within an authorized project or were likely to be taken for the project (317 U. S. at p. 379). Petitioner argues from this decision that any decrease in value of its property due to and arising after the legislative authorization of the project in the 1937 Act must be disregarded in determining just compensation; and it reasons that the enactment of the authorizing statute therefore constituted a taking of its property (Pet. 3–4). Assuming petitioner's premise to be sound, nevertheless the conclusion does not follow. The principles of value enunciated in the *Miller* case had reference to an eminent domain proceeding instituted by the Government in connection with a declaration of taking (317 U. S. at p. 371), and elements of value prop-

erly to be considered in assessing compensation for a taking can have little relevance to the determination of whether and when a taking has occurred; in fact, implicit in much of the opinion (317 U. S., pp. 374–379) is a recognition that land is not taken the instant that its eventual requirement for the project becomes probable or even certain.

2. There is likewise no merit to petitioner's contention that the authorization of the Central Valley project has deprived it of the use of dam sites on its property suitable for the creation of a reservoir for irrigation and hydroelectric purposes. Beside the fact that the pleadings contain nothing to suggest that petitioner is legally in a position to make such use of its lands,[2] no claim of taking can be predicated upon the circumstance that a possible use of petitioner's lands is rendered inadvisable because of the likelihood that the land will eventually be flooded. Cf. *Danforth* v. *United States,* 308 U. S. 271, 285–286; *United States* v. *Sponenbarger,* 308 U. S. 256, 267.

[2] In the absence of an allegation to the contrary, it may be assumed that the Pitt River is a navigable stream either because in fact navigable or susceptible of being made so by improvements (*United States* v. *Appalachian Power Co.*, 311 U. S. 377, 406–407). On this assumption, petitioner has no legal authority to place any dam or obstruction in the river without the consent of the United States, *id.*, p. 424, and no such consent is alleged.

Petitioner's claim that the substantial value of its property for reservoir, dam site and water power purposes was destroyed by the passage of the Act (Pet. 3) is of no avail. Any reduction in the value of property occurring "by reason of legislation for or the beginning or completion of a project" is merely one of the "incidents of ownership" which "cannot be considered as a 'taking' in the constitutional sense." *Danforth* v. *United States,* 308 U. S. 271, 285.[3] Even if the value of the property for reservoir purposes be assumed pertinent to the question of value when a taking actually occurs, but it does not give rise to a claim of taking, particularly where, as in this case, there is no allegation of intention or desire (see R. 6) to use the property for such purposes with which the construction of Shasta Dam has interfered.

[3] Petitioner also argues that a time eventually will occur when there is a taking of its property; that such time should now be legally fixed, and that the valuation eventually placed upon its property should neither be increased nor decreased by reason of the progress of the project (Pet. 13–15). This argument seems footless. It is possible that petitioner's lands never will be overflowed or otherwise taken. If they are eventually taken, the value which should then be placed upon them can be determined in suitable proceedings. And of course the statute of limitations, which petitioner fears may bar its rights unless it can sue at once (Pet. 16), cannot begin to run until the taking actually occurs. Lewis, *Law of Eminent Domain,* (3d ed.), § 964.

CONCLUSION

The decision below is correct and presents no conflict. We respectfully submit, therefore, that the petition for writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.
FRANCIS M. SHEA,
Assistant Attorney General.
DAVID L. KREEGER,
Special Assistant to the Attorney General.
PAUL A. SWEENEY,
VALENTINE BROOKES,
Attorneys.

APRIL 1943.

APPENDIX

Section 2 of the Act of August 26, 1937, c. 832, 50 Stat. 844, 850, provides:

> That the $12,000,000 recommended for expenditure for a part of the Central Valley project, California, in accordance with the plans set forth in Rivers and Harbors Committee Document Numbered 35, Seventy-third Congress, and adopted and authorized by the provisions of section 1 of the Act of August 30, 1935 (49 Stat. 1028, at 1038), entitled "An Act authorizing the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes", shall, when appropriated, be available for expenditure in accordance with the said pians by the Secretary of the Interior instead of the Secretary of War: *Provided,* That the transfer of authority from the Secretary of War to the Secretary of the Interior shall not render the expenditure of this fund reimbursable under the reclamation law: *Provided further,* That the entire Central Valley project, California, heretofore authorized and established under the provisions of the Emergency Relief Appropriation Act of 1935 (49 Stat. 115) and the First Deficiency Appropriation Act, fiscal year 1936 (49 Stat. 1622), is hereby reauthorized and declared to be for the purposes of improving navigation, regulating the flow of the San Joaquin River and the Sacramento River, controlling floods, providing for storage and

for the delivery of the stored waters thereof, for the reclamation of arid and semiarid lands and lands of Indian reservations, and other beneficial uses, and for the generation and sale of electric energy as a means of financially aiding and assisting such undertakings and in order to permit the full utilization of the works constructed to accomplish the aforesaid purposes: *Provided further,* That, except as herein otherwise specifically provided, the provisions of the reclamation law, as amended, shall govern the repayment of expenditures and the construction, operation, and maintenance of the dams, canals, power plants, pumping plants, transmission lines, and incidental works deemed necessary to said entire project, and the Secretary of the Interior may enter into repayment contracts, and other necessary contracts, with State agencies, authorities, associations, persons, and corporations, either public or private, including all agencies with which contracts are authorized under the reclamation law, and may acquire by proceedings in eminent domain, or otherwise, all lands, rights-of-way, water rights, and other property necessary for said purposes: *And provided further,* That the said dam and reservoirs shall be used, first, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses; and, third, for power.

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